2001

Tracy Brown v. Dannie Marrelli : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

OF THE

STATE OF UTAH

TRACY BROWN,
Plaintiff-Appellant,

vs.

DANNIE MARRELLI,
Defendant-Respondent.

Case No.
13348

BRIEF OF APPELLANT

Appeal from the Order of Dismissal of the
Third Judicial District Court of Salt Lake County
Honorable G. Hal Taylor, Judge

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Case No. 13348

BRIEF OF APPELLANT

STATEMENT OF CASE AND DISPOSITION IN LOWER COURT

This is a civil paternity suit. The lower court granted defendant's Motion to Dismiss.

STATEMENT OF FACTS

The State of Utah commenced a bastardy action against defendant on plaintiff's complaint on the 7th day of July, 1972, Salt Lake County Criminal No. 24599. During the course of this prosecution plaintiff's parents became apprehensive as to whether the case would be vigorously prosecuted (R.4) and hence plain-

tiff's father employed Ralph Sheffield, attorney at law of St. George, Utah to work with John B. Anderson, the Deputy District Attorney who was handling the case in the interest of plaintiff. Even so, vital and critical evidence and arguments were not presented to the jury and as a result the defendant was found "not guilty."

The evidence and arguments which were not presented to the jury were the following:

1. *The explanation as to why plaintiff did not tell defendant nor anyone else about her pregnant condition until the fifth month after intercourse.* (R.40)

The absence of this evidence allowed the defense counsel to argue as follows:

> "The glaring thing in this testimony, if this young man had intercourse with her, which he expressly denies, she, by her own testimony, knew where he lived, what he was doing, having called him, so she knew what his number was, but she goes through January, February, March, April, May until the middle of June, indicating, and that on my question, I said, 'When did you know you were pregnant?' And she said when she went to see the doctor on the 23rd of June."

2. *The facts that plaintiff and defendant had been alone and kissing on three or four occasions* (R. 7, 8) *prior to the act of intercourse which resulted*

in pregnancy (T. 93) As a result defendant's counsel argued in the State case as follows:

> "That's the only time she ever claims they had been together. Never been out together, never had a date. (T 150, l 28-30)

3. *The evidence of plaintiff's attending physician that the baby was born six days prior to the expected date, that the baby's physical condition was entirely consistent with her birth* 259 *days after intercourse and the absence of bleeding on that occasion is consistent with plaintiff's testimony that she was then a virgin.* (R.41)

The absence of such testimony enabled defendant's counsel to argue as follows:

> "The State has chosen, for reasons unknown to me, not to put on medical evidence as to the possible time of conception, that sort of thing. One thing I'll ask you people to do, and you are allowed under these instructions to use your own common sense, your own experience and inferences arising therefrom to determine where the truth lies in this matter. The testimony by Miss Brown is that the only time she was ever alone with Dannie Marrelli was on or about the 8th or 9th of January. The baby was born on the 25th of September. I think if you'll take the 22 days remaining in January, the number of days in February, March, April, May, June, July, August, and 25 days in September, you will find on that

basis, a 259-day pregnancy. Of course, as I say, the State hasn't chosen to give us any medical evidence as to whether this was a term birth or pre-term birth. There is no evidence before you as to the length of time for a term birth. However, in selecting this jury, I noted, and I'm sure Mr. Anderson did, and the judge, that each of you are sitting in the box at the present time have one or more children. I think you have had some experience with these things." (T 146, 147)

4. *Testimony of David Barton and Wayne Lambert that they had not had sexual intercourse with her at any time.* (R.....)

Defendant's counsel inferred that one of them might well be the father. He argued:

"Now, the only basis that we have for believing this woman hadn't had intercourse with other people, there are two of them, (1) she said she hadn't and (2) she claims she wasn't going out with any people during that time. Of course, her mother remembered people she had gone out with during that time. She had gone to ball games. She was going to dances. Is it reasonable to believe that this young lady, when she found out she was in trouble, worried about it for a period of five months, possibly talked to someone else, and possibly someone else was out of town and then went to the person she admits she wanted to be introduced to. . ." (T 149)

5. Mrs. Marrelli was not called as a witness even though she was present during a meeting of the mother, the alleged father and their parents.

Some people won't lie under any circumstances, not even in aid of their kin. Mrs. Marrelli is probably one of them as it seems certain that she would have been a witness for her son (as her husband was) if the testimony she would give would have been favorable to him. This should have been evident when the defense failed to call her. Had she been called as a rebuttal witness (to testify that the defendant did acknowledge being the father as Tracy (T 49), her mother (T 76) and her father (T 124) had testified but which the defendant (T 99 and his father denied (T 117) but disappointed the State's counsel in not contradicting her son and her husband there would nevertheless have been a positive benefit to the State's case as it would have emphasized the fact that such a meeting did indeed take place and why would a boy who denied being the father first meet with the mother to be and her father (T 102) then with both grandfathers to be (T 116) and finally with the mother to be and all the grandparents to be (T 119) if in fact he was not the father?. That Mrs. Marrelli was actually at the last referred to meeting could not have been denied by her without discrediting her son who had so testified (T 103) and her husband who had so testified (T 119). It should also be noted that all these meetings took place two days after Tracy told Dannie he was the father (T 102).

6. *The State's attorney objected to defense counsel's request of his client as to why he attended all the above meetings if he had not had intercourse with Tracy.*

Q. (Attorney Sumner J. Hatch) "Mr. Marrelli, if you are sure you are not the father of that child, why did you go to those meetings?"

Mr. Anderson: "I'll object as to the materiality."

Court: "Sustained. Well, its otherwise objectionable."

Thus the jury was deprived of the answer to what was probably the most significant question that could be asked of the defendant and the State was foreclosed from discrediting that answer and from dwelling on the implausability of the defendant attending all those meetings if he could not have been the father when that meeting was about the father's responsibility.

7. *Absence of rebuttal argument to defendant's counsel argument that plaintiff was not telling the truth about defendant asking her to bring her year book to his dormitory room so they could pick out a girl for his roommate since his roomate already had a Skyline High School year book.* (T. 151)

Rebuttal arguments that should have been made: (1) Defendant admitted that plaintiff did bring a year book (R 91). (2) If he wanted to get plaintiff into his room for immoral purposes it wouldn't matter whether he really wanted to see the year book or not,

(3) his roommate graduated in a class two years before plaintiff so it was an entirely different year book. (R. ....)

As a consequence defendant's counsel made this argument to the jury: "She comes up and says, 'I want to show you the yearbook'. (T. 151) He testifies there was a yearbook of the same year and school there at the time. Why would he want her to bring a yearbook? He's watching the football game."

And that argument was never challenged! Since credibility was the key issue this item may well have been the deciding factor.

In as much as the camplaint in question was dismissed without any evidentary hearing, the references to the record (R) or transcript (T) where the facts as plaintiff claims them to be established are not proof of those facts as no testimony or documents were introduced into evidence. The purpose of making them part of the record is to show by affidavits what proof is available to sustain plaintiff's contention that she ought not to be barred by the result of the prior proceedings for reasons set forth in the argument to follow:

ARGUMENT

POINT I

IT WAS ERROR FOR THE LOWER COURT TO GRANT DEFENDANT'S MOTION TO DISMISS WITHOUT ALLOWING PLAIN-

TIFF AN EVIDENTIARY HEARING ON THE DEFENSE OF RES JUDICATA.

The Order of Dismissal with Prejudice here appealed from is based on the grounds of res judicata and granted pursuant to defendant's Motion to Dismiss on that ground. Rule 12 (b) U.R.C.P. promises that every defense shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject-matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency or service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

Clearly res judicata is not one of those grounds for which such a motion lies and on which it can be granted.

Rule 8 (c) on the other hand provides that res judicata is one of the 19 specific affirmative defenses that *must* be pleaded by the defendant in his Answer. Here defendant had filed no answer. Here there has been no hearing on the issues raised by such an answer.

Procedurally the order in question is in error and should be reversed. However, unless plaintiff is also right as to the substantive issue which follows there

would be no benefit to anyone to remand the cause for further proceeding, hence Point II.

POINT II

PLAINTIFF'S PRESENT SUIT IS NOT BARRED BY RES JUDICATA OR COLLATERAL ESTOPPEL BECAUSE SHE HAS NEVER HAD A FAIR ADVERSARY PRESENTATION OF HER CAUSE.

Res judicata is wisely grounded on the policy that a party who has had one fair trial on an issue should not have a second one. However, as the California Supreme Court said in the case of *Jorgensen* v. *Jorgensen* (1948), 32 Cal 2d 13, 18, 193 Pd 728, 732 (and recently cited with approval in *People* v. *Camp,* 10 Cal App 3d 651, app. 89 Cal. Reptr. 242 (1970), "This policy must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which fully to present his case."

The issue in question is within the scope of an ALR Annotation on the subject, "Judgment in bastardy proceeding as conclusive of issues in subsequent bastardy proceeding" published in 37 ALR 2d 836. None of the cases cited therein, however, are sufficiently similar to the facts in the instant case to be useful as precedents. The author, however, declares, "There is nothing in the nature of a bastardy proceeding which necessarily pre-

vents the application therein of the general principle that a final judgment on the merits is conclusive as between the *same* parties on the same issue in a later proceeding (P. 836, 837, emphasis added). Of course case law is clear to the effect that persons who are privies to the parties as well as the parties themselves are subject to the limitation of res judicata. In 46 Am Jur 2d 683, under Sec 532 of "Judgments" it is stated:

> "A trial in which one party contests his claim against another should be held to estop a third person only when it is realistic to say that the third person was fully protected in the first trial. There can be no such privity between persons as to produce collateral estoppel unless the result can be defended on principles of fundamental fairness in the due process sense."

The real issue in this appeal is whether the results in the prior State case "can be defended on principles of fundamental fairness in the due process sense."

Bearing in mind that the control of the case was primarily, if not entirely, in the hands of the District Attorney and his assigned counsel, can it be said that plaintiff was adequately represented by counsel in the State trial? Certainly that issue has not been the subject of any evidentiary hearing. Plaintiff submits that Rule 13 of U.R.C.P. requires such a hearing and proof by defendant that she had such representation in fact in the prior case before it bars her present suit.

In the case of *Aliers* v. *Turner,* 22 *Utah* 2*d* 118, 449 *P* 2*d* 241, this court held that a party convicted of burglary and sentenced to serve a term of one to twenty years in the Utah State Prison was entitled to a new trial when his representation did not meet the requirements of due process. There this court said:

> We are not here concerned with the creditability of petitioner's story. It might be said that parts of it seem quite incredible, or even foolish. But hindsight seem foolish even to themselves. On the basis of this record, we think the only reasonable conclusion to de drawn therefrom is that if petitioner had had counsel actively interested in protecting his rights the result may have been more favorable to him.
>
> The right of an accused to have counsel as assured by Sec. 12, Art. I, Utah Constitution, and by the VI and XIV Amendments to the U. S. Constitution is one of those rights "rooted in the traditions and conscience of our people" as essential to the protection of individual liberties and therefore included in our concept of due process of law. The requirement is not satisfied by a sham or pretense of an appearance in the record by an attorney who manifests no real concern about the interests of the accused. The entitlement is to the assistance of a competent-member of the Bar, who shows a willingness to identify himself with the interests of the defendant and present such defense as are available to him

under the law and consistent with the ethics of the profession.

The failure of such representation for the petitioner herein is a departure from due process of law. *This has been recognized as one of the exceptions from the rule of finality of judgments, and which may therefore be attacked collaterally under habeas corpus."* (Emphasis added, foot notes omitted)

Should one convicted of crime be entitled to greater constitutional protection than the mother of an illegitimate child? Should an illegitimate child be less entitled to his or her day in court than a presumably legitimate child is entitled to the same rule of evidence needed to convict one of crime? *Holder* v. *Holder,* 9 *Utah* 2*d* 163, 340 *P* 2*d* 761.

It must be clearly understood that granting the relief plaintiff is seeking would not open up the door to retry every bastardy case that was lost by the County Attorney hereafter (incidentally there have been only 29 acquitals in the past 22 years in the entire State of Utah according to the official published reports for the period July 1, 1948 to June 30, 1972. There were 625 bastardy trials reported in said publications) (See appendix). This case would be precedent for retrials only when at least three other elements occur. First, no one was told of the pregnancy for over five months after the sex act occured so as to require a more careful prosecution. Second, counsel for the mother failed to call

the other males the alleged father linked to the complaining witness. Third, the mother's counsel failed to call the attending physician when birth occured 259 days after the act of intercourse.

It should be noted as to the factors just listed that proof the those facts clearly appears from the transcript of the State's prior case standing alone. (As to (1) - T63. As to (2) and (3) - T2)

This is a case of initial impression despite the dicta in *State v Judd* 27 Utah 279, 493 P.2d 604, hence this court is free to do justice between the parties so long as its precedent does not establish a policy which is inamicable to justice hereafter. As noted above, it is almost certain that no other case will ever be retried as a result of the decision in this case. But what about justice to this particular defendant? Certainly, it was not his fault nor his counsel's fault that the State's case was so handled that plaintiff did not have her fair day in court. Should he bear the expense of a second trial? No. The equitable powers of the courts are such that he who seeks equity should be required to do equity and the defendant's expenses of a second trial including reasonable attorney's fees should be assessed to the plaintiff if he prevails or be deducted from the pay ments he is ordered to make if plaintiff prevails.

CONCLUSION

The Order of Dismissal should be vacated and this case remanded to the District Court of Salt Lake Coun-

ty with appropriate instructions relative to trial of the issue of res judicata and the expenses of further proceedings if a new trial is found justified under the *Aliers* exception to the res judicata rule.

Respectfully Submitted

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APPENDIX

TRIAL OF BASTARDY ACTIONS IN ALL UTAH COURTS FOR THE FISCAL YEARS 1950-1972

Biennial Ending	1. C.*	1. A.*	2. C.	2. A.	3. C.	3. A.	4. C.	4. A.	5. C.	5. A.	6. C.	6. A.	7. C.	7. A.	Total	
1950	1	0	3	0	7	0	2	0	0	0	0	0	4	0	17	0
1952	2	0	0	0	13	1	1	0	0	0	3	0	0	0	19	0
1954	1	0	2	0	35	1	0	0	0	0	1	0	6	0	44	1
1956	1	1	19	0	33	1	0	0	0	0	0	0	3	0	56	2
1958	2	0	14	0	30	4	3	1	0	0	1	0	5	0	55	5
1960	0	0	9	1	28	1	4	0	0	0	0	0	0	0	41	2
1962	2	0	17	0	33	2	10	0	1	0	0	0	2	0	65	3
1964	1	0	13	1	48	3	11	0	0	0	0	0	7	1	80	5
1965	3	0	23	2	32	3	10	0	3	0	0	0	11	0	82	5
1967	2	0	8	0	Not Rptd.		2	0	4	0	0	0	17	0	33	0
1968	3	0	10	0	Not Rptd.		6	0	0	0	1	0	11	0	31	0
1970	1	0	16	1	14	3	1	0	0	0	0	0	15	1	47	2
1972	1	0	13	1	11	0	0	0	1	0	0	0	—	—	26	1
Total	20	1	147	6	284	19	50	1	9	0	6	0	80	2	596	29

*C = Convictions

*A = Acquittals